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VII. Labor Law

A. Summary Judgment in Unfair Labor Practice Cases—NLRB v. E-Z Davies Chevrolet, 395 F.2d 191 (9th Cir. 1968).

The question of whether or not the NLRB can proceed to summary judgment in an unfair labor practice case was answered affirmatively by the Ninth Circuit in *NLRB v. E-Z Davies Chevrolet.*[1] The Board's use of summary judgment was approved by the court because the respondent, E-Z Davies, failed to raise factual issues which could be resolved only after an evidentiary hearing. Thus, in a proper case, no evidentiary hearing need be afforded an employer who objects to an order by the Board to bargain with a newly selected employee bargaining representative.

Involved in the facts of the *E-Z Davies* case is the labyrinth of procedures governing collective bargaining representation elections[2] and the unfair labor practice proceedings[3] which may follow these elections. In *E-Z Davies*, the company's automobile salesmen selected a local of the Teamsters Union,[4] in a representation election, to represent them in collective bargaining proceedings with management. The company refused to bargain with the selected local, thus committing the unfair labor practice which led ultimately to the Ninth Circuit's decision. The *E-Z Davies* representation election had been held at the order of an NLRB Regional Director[5] pursuant to a petition

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[1] 395 F.2d 191 (9th Cir. 1968), *enforcing* 161 N.L.R.B. 1380 (1966).

[2] Representation procedures governing section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c) (1964), are covered under the NLRB rules in 29 C.F.R. §§ 102.60-.72 (1968).

[3] Unfair labor practice procedures governing sections 10(a) to (i) of the National Labor Relations Act, 29 U.S.C. §§ 160(a)-(i) (1964), are covered under the NLRB rules in 29 C.F.R. §§ 102.9-.59 (1968).

[4] Professional Automobile Salesmen, Drivers, and Demonstrators, Local No. 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America [hereinafter referred to as the Union].

[5] Full responsibility for representation proceedings has been exercised by NLRB Regional Directors since 1961. This responsibility was formerly vested solely in the Board. The Board delegated the responsibility to the Regional Directors after Congress amended section 3(b) of the National Labor Relations Act in 1959 to allow for such delegation. 29 U.S.C. § 153(b) (1964). Petitions for representation elections are filed with the Regional Director. 29 C.F.R. § 102.60 (1968). The Director then investigates to see whether or not there is "reasonable cause to believe that a question of representation

filed with him by the union. The company objected to the election and its results on the grounds that the bargaining unit was inappropriate and that the union observer at the election was a non-employee union officer.[6] Although the company did not allege any conduct on the part of the union official which might have affected the fairness of the election, it, nevertheless, contended that the mere presence of a union officer as an observer was enough to invalidate the election results.

The NLRB Regional Director rejected E-Z Davies' contentions on the basis of his staff's investigation, and without an evidentiary hearing covering the company's objections,[7] and certified the union as the salesmen's bargaining agent. The company appealed this ruling to the Board,[8] but the Board declined to review the Regional Director's decision and denied a subsequent company request to reconsider.[9] At that point, the company refused to recognize or bargain with the union.[10] As a result, the Board's general counsel issued a complaint charging the company with failing to bargain, a violation of section 8(a) (5) of the National Labor Relations Act.[11]

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affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit . . . ." 29 C.F.R. § 102.63(a) (1968). If the Director so finds and decides that there will be an election, his decision is subject to appeal to the Board. 29 C.F.R. § 102.67 (1968).

[6] NLRB v. E-Z Davies Chevrolet, 395 F.2d 191 (9th Cir. 1968).

[7] With regard to objections to conduct of an election or conduct affecting the result of an election, see 29 C.F.R. § 102.69 (1968). Under this rule the Regional Director may investigate charges, decide the case, and certify the result of the election without a hearing on the objections if it appears to the Regional Director that the objections do not present "substantial and material factual issues." If such issues exist, the rules call for the Regional Director to cause an evidentiary hearing to be held for their resolution. 29 C.F.R. § 102.69 (c) (1968).

[8] If the Regional Director overrules objections to the election, the objecting party has the right to a review by the Board if the party alleges one or more of the following:

"(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy." 29 C.F.R. § 102.67(c) (1968).

[9] The Board's "[d]enial of a request for review [constitutes] an affirmance of the regional director's action . . . ." 29 C.F.R. § 102.67(f) (1968).

[10] 395 F.2d 191 (9th Cir. 1968).

[11] National Labor Relation Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

E-Z Davies answered the complaint by a general denial that its conduct amounted to an unfair labor practice. The NLRB's general counsel then asked for summary judgment against the company by motion made directly to the Board,[12] in an attempt to by-pass the trial portion of the unfair labor practice proceeding. There followed a Board order to E-Z Davies to show cause why the motion should not be granted. The company responded to the order by arguing that the Board had no authority to grant motions for summary judgment. The company asserted that the Board could not rule on complaints without conducting an evidentiary hearing and that summary unfair labor practice proceedings were not sanctioned by the Administrative Procedure Act (APA) or by the National Labor Relations Act (NLRA). The motion, however, was granted, and the Board ordered the company to bargain with the union.

The case came before the Ninth Circuit on the Board's petition for enforcement of its order to bargain. In an opinion written by Judge Ely, the court stated "we hold that the Board properly granted motions for summary judgment. This issue is adequately discussed and properly resolved in the Board's reported opinions in the present proceeding."[13]

The main issue presented by *E-Z Davies* is whether the Board has the legal power to grant summary judgment under the facts stated.[14] It appears from the holding that summary proceedings in an unfair labor practice case are not precluded by the provisions of either the Administrative Procedure Act or the National Labor Relations Act. Also, the Board's denial of an evidentiary hearing to an objecting employer in both the representation proceeding and the subsequent unfair labor practice proceeding is neither contrary to law nor a denial of due process.[15] The result of *E-Z Davies* is the Ninth Circuit's approval of the Board's application of the "substantial and material issues" test to unfair labor practice proceedings as well as to representation proceedings.[16]

Substantial and Material Factual Issues Test

The "substantial and material issues" test[17] has been used by the

[12] E-Z Davies Chevrolet, 161 N.L.R.B. 1380, 1381 (1966).

[13] 395 F.2d 191, 193 (9th Cir. 1968).

[14] *Id.*

[15] *See* E-Z Davies Chevrolet, 161 N.L.R.B. 1380 (1966).

[16] *Accord,* Sonoco Prods. Co. v. NLRB, 399 F.2d 835 (9th Cir. 1968). In this later case the court held in remanding to the Board on similar facts for a hearing "that the 'substantial and material factual issues' test . . . . [was the standard by which the court judged] the correctness of the Board's failure to grant petitioner the hearing it sought." *Id.* at 839.

[17] What constitutes "substantial and material factual issues" is not

Board to determine whether an employer who objects to the conduct of an election may have a hearing in the representation proceeding. The Board promulgated the rule that hearings will be granted in this proceeding when the party objecting to the certification of a bargaining agent alleges substantial and material issues of fact which may be resolved only after such a hearing.[18] Behind the rule and the holdings of the Board is the fact that under the NLRA and the APA a hearing in the representation proceeding is not a matter of right. Under the National Labor Relations Act, whether there is to be an evidentiary hearing in a representation case is discretionary with the Board.[19] The "substantial and material issues" test, as applied to the representation proceeding alone, has been upheld by the Ninth[20] and other circuits[21] as reasonably within the discretion of the Board under the NLRA. Representation proceedings are specifically exempted from the provisions of the Administrative Procedure Act.[22]

Contrary to the rule as to the representation proceeding, the APA's provisions do apply to the unfair labor practice proceeding.[23]

within the scope of this note, but generally speaking, it is a disputed fact which, if found for the objecting party, would cause the election to be invalidated. Conduct which falls into the following categories invalidates an election: (1) conduct amounting to an unfair labor practice and (2) conduct not amounting to an unfair labor practice but which creates an atmosphere calculated to prevent "a free and untrammeled choice by the employees." General Shoe Corp., 77 N.L.R.B. 124, 126 (1948). *See also* Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Note, *National Labor Relations Act Elections: Post Election Objections*, 38 TEMP. L.Q. 288 (1965).

[18] 29 C.F.R. § 102.69(c) (1968). In this connection, "the Board has uniformly refused to direct a hearing on such objections unless the objecting party supplies specific evidence of conduct which *prima facie* would warrant setting the election aside. [Citations omitted]. The speculative possibility advanced by the Employer that evidence to support its allegations might transpire at a hearing is insufficient to warrant the delay in these proceedings which would arise from directing such a hearing." Orleans Mfg. Co., 120 N.L.R.B. 630, 631-32 (1958).

[19] National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1964). *See* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945) (due process satisfied if a hearing held before final order becomes effective); NLRB v. J.R. Simplot Co., 322 F.2d 170 (9th Cir. 1963); 148 CCH LAB. L. REP. 146 (1968) (32d Annual Report of NLRB).

[20] NLRB v. J.R. Simplot Co., 322 F.2d 170 (9th Cir. 1963).

[21] *E.g.*, NLRB v. O.K. Van Storage, Inc., 297 F.2d 74 (5th Cir. 1961).

[22] Administrative Procedure Act § 5, 60 Stat. 239 (1946). This section applies, according to the provisions thereof, "[i]n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . . (6) the certification of employee representatives . . . ."

[23] Labor Management Relations Act § 6, 61 Stat. 140 (1947): "The Board

The NLRA and the Board's rules appear to contemplate a hearing as a matter of course in every unfair labor practice case.[24] Nevertheless, beginning in 1965, the Board allowed summary judgments in unfair labor practice cases where there had been a hearing in the underlying representation proceeding.[25] Finally, in *E-Z Davies,* the Board declared that it was extending the "substantial and material issues" test to the unfair labor practice case,[26] and under this test granted summary judgment in the unfair labor practice proceeding even though there had been no hearing in the underlying representation proceeding. The prior proceeding in *E-Z Davies* consisted only of the Regional Director's *ex parte* decision, upheld by the Board on appeal. The Board, in extending the test to the unfair practice proceeding, stated that it made no sense to apply a rule limiting hearings in one proceeding if the employer could obtain an evidentiary hearing on the same objection in the other.[27]

When the Board's first case in which summary judgment was employed reached the Fourth Circuit, the use of the procedure in the unfair labor practice proceeding was greeted with equivocation.[28] Recently, however, the courts have approved the use of summary judgments in unfair labor practice proceedings where there has been

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shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

[24] *E.g.,* 29 C.F.R. § 102.15 (1968) (emphasis added): "After a charge has been filed . . . [and informal methods for reconciling the grievance have failed] the regional director . . . shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of *hearing before a trial examiner* . . . ." It is also stated in National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (1964), that "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board . . . shall have power to issue . . . a complaint stating the charges . . . and containing a notice of hearing . . . ."

[25] KVP Sutherland Paper Co., 143 N.L.R.B. 834 (1965). *See also* Collin Aikman Corp., 160 N.L.R.B. 1750 (1966) (motion for summary judgment directly to Board bypassing trial examiner stage of hearing); Macomb Pottery Co, 157 N.L.R.B. 1616 (1966); Draper Corp., 152 N.L.R.B. 520 (1965) (summary judgments granted by trial examiners).

[26] E-Z Davies Chevrolet, 161 N.L.R.B. 1380, 1383 (1966).

[27] *Id.* at 1383.

[28] NLRB v. KVP Sutherland Paper Co., 356 F.2d 671, 673-74 (4th Cir. 1966), *denying enforcement of* 143 N.L.R.B. 834 (1965). "Perhaps even more to the point, the National Labor Relations Act (let alone due process!) squarely provides for hearings [quoting 29 U.S.C. 160(b) (1964)] . . . ." *Id.* at 673. "[But] [w]e are by no means unimpressed by [the Board's] argument that litigation must have an end somewhere and that this case has already produced great delay." *Id.* at 674.

a representation hearing.[29] The Ninth Circuit goes beyond this trend by approving the application of summary judgment to an unfair labor practice proceeding where there was no hearing for the first time in *E-Z Davies.*

Arguments for Summary Judgment

The reasons for the Board's use of summary judgment in representation-refusal-to-bargain cases such as *E-Z Davies* are compelling. First, the Board has felt the need to deal with all cases as quickly as possible to relieve the pressure of a mounting workload.[30] Since 1958 that workload has increased dramatically. In the 10 year period prior to 1958, the NLRB handled a yearly average of approximately 5,000 unfair labor practice charges.[31] The number of charges jumped to 12,000 in 1958.[32] In fiscal 1967, the number of unfair labor practice charges exceeded 30,000,[33] and it is estimated that the NLRB will be confronted with 50,000 charges a year by 1972.[34] Neither the Board's manpower nor its appropriations have been sufficient to keep abreast of the burgeoning workload.[35] One solution has been to innovate time-saving remedies and procedures.[36]

Secondly, the Board's view of its function in representation cases has changed in the past 10 years. In the 1959 congressional hearings that considered amendments to the National Labor Relations Act, the Board urged Congress to pass provisions allowing the Board to delegate responsibility for representation matters to NLRB Regional Directors.[37] Congress amended the NLRA as the Board requested[38] and the Board delegated authority over representation proceedings

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[29] *E.g.*, NLRB v. Aerovox Corp., 390 F.2d 653 (4th Cir. 1968); NLRB v. Puritan Sportswear Corp., 385 F.2d 142 (3d Cir. 1967); Neuhoff Bros. Inc., v. NLRB, 362 F.2d 611, 613 (5th Cir. 1966); *see* NLRB v. Macomb Pottery, 376 F.2d 450, 452 (7th Cir. 1967) (no hearing requested in representation case).

[30] See authority cited notes 31-36 *infra.*

[31] Rothman, *In Search of Improving the Administration of the National Labor Relations Act*, 13 LAB. L.J. 777, 778 (1962).

[32] *Id.*

[33] 148 CCH LAB. L. REP. 1 (1968) (32d Annual Report of the NLRB).

[34] Rothman, *In Search of Improving the Administration of the National Labor Relations Act*, 13 LAB. L.J. 777, 779 (1962).

[35] *See* Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 60-62 (1964); Rothman, *In Search of Improving the Administration of the National Labor Relations Act*, 13 LAB. L.J. 777, 779-80 (1962).

[36] McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 LAB. L.J. 131, 141 (1968).

[37] S. REP. No. 187, 86th Cong., 1st Sess. at 31 (1959).

[38] Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 701(b), 73 Stat. 542.

to the Regional Directors in 1961.[39] Since 1961, the Board has tended to view representation elections and unfair labor practices as separate matters. Regional Directors exercise jurisdiction over representation cases; trial examiners exercise jurisdiction over unfair labor practice matters; and the Board itself sits in review of the Regional Directors and the trial examiners as an appellate body.[40] In the view of the courts and the statutes, decisions as to certification of bargaining representatives in a representation proceeding are not "final" but merely dispositive of challenges to the conduct of the election which do not result in refusal-to-bargain unfair labor practice charges.[41] The Board, on the other hand, has come to look upon a decision in a representation case as the *final* adjudication of issues relating to the certification of bargaining representatives.[42]

From this "finality" of the representation judgment, there arises an argument analogous to the doctrine of res judicata. The argument first appeared in Board decisions in unfair labor practice cases where there had been a hearing in the prior representation case.[43] The argument advanced is that issues which were or could have been litigated in the underlying representation proceeding cannot be relitigated in the unfair labor practice proceeding.[44] In *E-Z Davies*, the extent of the prior "litigation" of the issue of the validity of the representation election consisted of the NLRB Regional Director's *ex parte* decision and its affirmation by the Board on appeal.[45]

However, the Board's most telling argument does not appear to be in the physical pressure of the caseload alone, nor in the notions of res judicata implicit in the Board's position taken after representation jurisdiction was delegated. But taking these two developments into account, use of summary judgment has its greatest value and justifi-

[39] *Hearings before the Subcomm. on National Labor Relations Board of the House Comm. on Education and Labor on the Administration of the Labor Management Relations Act by the NLRB*, 87th Cong., 1st Sess., pt. 1, at 17 (1961) (testimony of NLRB Executive Secretary Field) [hereinafter cited as *Pucinski Hearings*].

[40] *See id.* pt. 2, at 1331 (testimony of NLRB Chairman McCulloch). *See also* Farmer, *Problems of Organization and Administration of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 353, 365 (1960).

[41] *See* National Labor Relations Act §§ 9(c)(3), 10(f), 29 U.S.C. §§ 159 (c)(3), 160(f) (1964). *See also* Eastern Greyhound Lines v. Fusco, 310 F.2d 632, 634-35 (6th Cir. 1962).

[42] Address by Jay S. Siegel, 14th Annual Institute on Labor Law of the Southwestern Legal Foundation, Nov. 2, 1967, in LABOR RELATIONS YEARBOOK—1967, at 231, 235 (1968).

[43] *E.g.*, KVP Sutherland Paper Co., 143 N.L.R.B. 834 (1965).

[44] *E.g.*, Union Bros., 162 N.L.R.B. No. 140 (Feb. 8, 1967) (could have been litigated in prior proceeding); Brush-Moore Newspapers, Inc., 161 N.L.R.B. 1620, 1622 (1966).

[45] *See* NLRB v. E-Z Davies Chevrolet, 395 F.2d 191, 192 (9th Cir. 1968).

cation as a logical safeguard to an employee's right of collective bargaining in the face of the "elusive problem of delay" often existing in the aftermath of a representation election.[46]

The National Labor Relations Act declares that it is the policy of the United States to encourage the collective bargaining relationship.[47] "[I]t is implicit in the Act that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved, with litigious questions reserved for the proceedings for review or enforcement of Board orders."[48] Protracted litigation over the validity of an election may ultimately scuttle effective union organization despite an eventual finding by the courts that the election was a valid manifestation of the employees' wishes, and that the employer had a duty to bargain.[49] Short of actual destruction of the organizing effort, "[a] remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Governmental intervention."[50]

A full hearing as a matter of right in an unfair labor practice proceeding following a representation case raises opportunities to delay an adverse ruling and thereby to obviate its effect.[51] By refusing to bargain, an employer can rely on obtaining a relatively inexpensive and lengthy review of his objections in the unfair practice case, during which time there can be no effective unionization of his business. In the period between the election and the final order of the Board in the unfair practice case, employee turnover and employee disaffection resulting from a union's apparent inability to produce promised results, might secure for the employer what he is unable to win at the polls in the representation election. Delay, cheaply bought by a refusal to bargain, can have devastating results for the union.[52]

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[46] McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 LAB. L.J. 131, 141 (1968).

[47] National Labor Relations Act § 1, 29 U.S.C. § 151 (1964): "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[48] NLRB v. O.K. Van Storage, Inc., 297 F.2d 74, 76 (2d Cir. 1963).

[49] *See* McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 LAB. L.J. 131, 136 (1968).

[50] *Id.* at 133, *quoting* S. Doc. No. 81, 86th Cong., 2d Sess. 2 (1960).

[51] *See* NLRB v. Joclin Mfg. Co., 314 F.2d 627, 632 (2d Cir. 1963).

[52] *See Pucinski Hearings, supra* note 39, at 155-57 (Pollack testimony); McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 LAB. L.J. 131, 136 (1968). *See generally* Farmer, *Problems of Organ-*

By using summary judgment in representation-refusal-to-bargain unfair labor practice proceedings, the Board confines the issue of certification of bargaining representatives to the Regional Directors and allows the employer only limited review in the representation proceeding itself. Thus, summary judgment effectively eliminates most of the repetitive unfair labor practice proceeding and leaves only that part of the proceeding necessary to make Board orders final for the purposes of review or enforcement by a court of appeals.

In addition to eliminating redundant proceedings, summary judgment expedites access to review and enforcement of Board orders. This result should afford the employer who has meritorious objections to a Regional Director's certification of a union more speedy relief from Board orders to bargain. At the same time, the expense of court of appeals litigation should further limit the advantages of delay accruing to the employer who refuses to bargain merely to buy time.

Due Process and Summary Judgment

The benefits derived from the use of summary judgment may be desirable in the eyes of a beleagured NLRB and an anxious union. However, there remains the question of whether there is a denial of administrative due process in allowing summary judgment based upon the *ex parte* determination of an NLRB Regional Director. Professor Davis, in his treatise on Administrative Law,[53] states that whether an evidentiary hearing of the kind demanded by E-Z Davies is necessary in an administrative proceeding depends upon whether or not there are adjudicative facts at issue.[54] "Adjudicative facts usually answer the questions of who did what, where, when, how, why, [and] with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury . . . ."[55] Davis feels that an evidentiary hearing is neither necessary nor desirable when there are no "adjudicative facts," but merely "legislative facts."[56] "Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[57] According to Davis, adjudicative facts are the kind of facts which ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them in an open hearing.[58] The courts have

ization and Administration of the National Labor Relations Board, 29 GEO. WASH. L. REV. 353, 363-64 (1960).

53 K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 7.02 (1958).

54 *Id.*

55 *Id.* § 7.02, at 413.

56 *Id.*

57 *Id.*

58 *Id.*

echoed this theme.

However, the courts have also stated that "there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of ceritification."[59] There is nothing in the Administrative Procedure Act, the National Labor Relations Act, or the Board rules, which specifically precludes the use of summary proceedings in unfair labor practice cases.[60] The language of these acts and rules, however, appears to contemplate a hearing in each case.[61] In the face of the apparently contradicting language of the statutes and rules, the Board justifies its opting for summary judgment on the ground that the Constitution "protects procedural regularity, not as an end in itself, but as a means of defending substantive interests."[62] A strict interpretation of statutory language must be weighed against the right of employees to enjoy collective bargaining.

Due Process and E-Z Davies

With this analysis and background in mind, the question that remains is whether E-Z Davies' rights were fairly weighed by the NLRB. The Board provided E-Z Davies the opportunity to object to election conduct and to have its objections tested in an evidentiary hearing.[63] However, to gain such a hearing, E-Z Davies had to convince the Regional Director that its objections raised issues in the nature of "who did what, where, when, how, why, [and] with what motive or intent,"[64] which were crucial—that is to say, substantial and material—to a determination of whether or not the election was fair under Board policy as determined by Board precedent.[65] When E-Z Davies failed to convince the Regional Director that it had raised factual issues which could be resolved only after a hearing, the company had the opportunity to have the decision of the Regional Di-

[59] NLRB v. Bata Shoe Co., 377 F.2d 821, 826 (4th Cir. 1964).

[60] For applicable National Labor Relations Act provisions and Board Rules, see note 3 *supra*. *See also* Administrative Procedure Act § 7, 5 U.S.C. 556(d) (1964), *as amended*, (Supp. II, 1967): "Except as otherwise provided by statute . . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

[61] 5 U.S.C. 556(d) (1964), *as amended*, (Supp. II, 1967).

[62] As in other Board cases, the Board in E-Z Davies Chevrolet, 161 N.L.R.B. 1380, 1384 (1966), used language similar to that found in Fay v. Doud, 172 F.2d 720, 725 (2d Cir. 1949) (Hand, J.).

[63] See text accompanying note 7 *supra*.

[64] K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

[65] See text accompanying note 17 *supra*.

rector reviewed by the Board before the representation proceeding was closed and certification became "final."[66] In the following unfair labor practice proceeding, E-Z Davies was again afforded review of the Regional Director's decision through argument to the Board on the order to show cause why summary judgment should not be granted. Had E-Z Davies developed or discovered evidence which was not available at the time of the representation proceeding, and which met the "substantial and material issues" test, a full hearing in the unfair labor practice proceeding would have been granted.

In coming to his conclusion in the representation proceeding, the Regional Director not only made no *ex parte* determination of *crucial* adjudicative facts, he made no determination of *any* adjudicative facts. The essential fact alleged by the employer was that the union's observer at the representation election was not an employee of company, but rather was a union officer. This "fact" was disputed by no one.[67] Therefore, there was no factual issue to be determined by the Regional Director, much less a factual issue of such crucial importance that the validity of the election hung in the balance until its resolution.

The decision made by the Regional Director appears to have been based upon what Professor Davis terms "legislative" facts, or generalized facts which help decide questions of policy, law and discretion.[68] Two such facts were determined in overruling E-Z Davies' objections without a hearing. First, the Regional Director decided that there was no conflict in the factual allegations of the parties that gave rise to a material factual dispute which could be resolved only after an evidentiary hearing. Secondly, he decided that as a matter of Board precedent a non-employee, union official could act as an observer at a representation election without prejudicing the fairness of that election. E-Z Davies appealed the Regional Director's legal conclusions to the Board and the Board affirmed[69] the Director, thus affirming the certification of the union as the salesmen's bargaining representative and bringing the representation proceeding to a close.

Conclusion

Dissatisfied with the results of the representation case, E-Z Davies refused to bargain with the representative its employees had selected. Having failed to convince the Board in the representation proceeding that it had a meritorious objection to the election, E-Z Davies was properly denied "another bite of the same apple" in the subsequent

[66] 29 C.F.R. § 102.67 (1968); notes 8 and 9 *supra.*

[67] NLRB v. E-Z Davies Chevrolet, 395 F.2d 191 (9th Cir. 1968).

[68] K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 7.02 (1958).

[69] 395 F.2d 191 (9th Cir. 1968).

unfair labor practice case. To allow an evidentiary hearing in the unfair labor practice proceeding on the same issues alleged and disposed of in the representation proceeding serves no legitimate due process end. It merely encourages disrespect for the determinations made in the representation proceeding, and destroys any efficacy in the representation case rule that there will be no evidentiary hearings on allegations which do not raise material factual considerations. A repetitious hearing in an unfair labor practice case to consider a stale issue can serve no purpose but to encourage frivolous, dilatory litigation productive of delays which dilute the rights of collective bargaining guaranteed to labor by the National Labor Relations Act.

The Ninth Circuit has wisely agreed with the National Labor Relations Board that summary judgment and the "substantial and material factual issues" test are useful and legitimate tools for the Board to apply to the representation-unfair labor practice proceeding.[70] The court has approved the procedural innovations as furthering the policy of the United States to secure industrial peace by protecting the right of workers to bargain collectively.

It remains to be seen whether the Ninth Circuit will extend its approval of summary proceedings to other quasi-judicial agencies. However, the *E-Z Davies* decision does seem to suggest that where substantive rights may be prejudiced by reading the Administrative Procedure Act and other legislation to give parties an absolute right

[70] Construing three Ninth Circuit cases, it is seen first that in *J.R. Simplot* the court upheld the "substantial and material issues" test as it applied to the representation proceeding by quoting from *O.K. Van Storage, Inc.*: " 'The opportunity for protracted delay of certification of the results of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent. An objecting party who fails to satisfy such conditions has no cause for complaint . . . .' " NLRB v. J.R. Simplot Co., 322 F.2d 170, 172 (9th Cir. 1963), *quoting* NLRB v. O.K. Van Storage, Inc., 297 F.2d 74, 76 (5th Cir. 1961). The Ninth Circuit continued, stating: "The same may be said with even greater force with respect to exceptions to a report on objections. . . . In reviewing orders upholding elections or declaring them invalid the proper test is whether the Board's order constituted abuse of discretion." NLRB v. J.R. Simplot Co., 322 F.2d 170, 172 (9th Cir. 1963). In *E-Z Davies* the court endorsed as "adequate" the Board's reasoning in extending the test referred to in *Simplot* beyond the representation case to the unfair labor practice case. NLRB v. E-Z Davies Chevrolet, 395 F.2d 191, 192 (9th Cir. 1968). Finally, in recently decided *Sonoco* the court flatly stated: "We merely hold that the 'substantial and material factual issues' test . . . provides a proper and appropriate standard for judging whether a party challenging the results of a representation election should have the benefit of a hearing. It is against that standard that we judge the correctness of the Board's failure to grant petitioner the hearing it sought." Sonoco Prods. Co. v. NLRB, 399 F.2d 835, 839 (9th Cir. 1968).

to be heard, the Ninth Circuit will be receptive to argument that no such absolute right exists.

J. L. A.

B. Illegal Boycotts—NLRB v. Salem Building Trades Council, 388 F.2d 987 (9th Cir. 1968).

Rather than hold that an ingenious union attorney had located a loophole in section 8(b)(4)(B) of the National Labor Relations Act,[1] the Ninth Circuit, without writing an opinion, affirmed the NLRB decision in *NLRB v. Salem Building Trades Council.*[2]

The Salem Building Trades Council was involved in a dispute with Reimann Construction Company, a non-union employer. Northridge Industries engaged Reimann to build a motel, and Candelaria Investment Company engaged it to build an ice cream parlor. The Union did not interfere with the construction and both buildings were completed without difficulty, each opening for business in the fall of 1965. The Union then boycotted both businesses, its signs proclaiming: "THIS BUILDING BUILT UNDER SUB-STANDARD WAGES AND CONDITIONS BY REIMANN CONSTRUCTION COMPANY."[3] Reimann filed a complaint with the NLRB against the Union charging that the Union's boycotts violated section 8(b)(4)(B) of the National Labor Relations Act. Section 8(b) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents . . .
> (ii) to threaten, coerce, or restrain any person engaged in commerce or in industry affecting commerce, where . . . an object thereof is (B) forcing or requiring any person . . . to *cease doing business* with any other person . . . .[4]

The Union responded that it could not force Northridge and Candelaria to cease doing business with Reimann because they were no longer dealing with Reimann, the contractual ties between the parties having disappeared with the completion of the buildings. The apparent goal of the Union was to coerce Northridge and Candelaria to *refrain* from engaging Reimann in the future and the Union's boycotts were intended to carry out this purpose.[5]

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[1] Labor-Management Reporting and Disclosure Act (Landrum-Griffin Amendment) § 704(a), 29 U.S.C. § 158(b)(4) (1964), *amending* National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964), *amending* 49 Stat. 452 (1935).

[2] 388 F.2d 987 (9th Cir. 1968).

[3] Salem Bldg. Trades Council, 163 N.L.R.B. No. 9, at 4 (Feb 20, 1967).

[4] 29 U.S.C. § 158(b)(1964) (emphasis added).

[5] Salem Bldg. Trades Council, 163 N.L.R.B. No. 9, at 6 (Feb. 20, 1967).

The NLRB assumed the Union's contention—that it could not be enjoined because there was no existing business relationship between Northridge or Candelaria and Reimann—was true and still found the boycotts to be illegal. It held that an existing business relationship was not "an indispensable prerequisite for finding a violation . . . ."[6] Although some attempts to influence the activities of neutral employers could be found permissible under the statute, the NLRB concluded that the Union activity complained of constituted impermissible conduct under the section. This result was explained as follows:

> To hold . . . that upon the completion of one contract the neutral employers, by virtue of their past business dealings, become fair game for picketing pressures by a union seeking, as here, to enforce its blacklist of the primary employer, would be to apply that Section in a manner inconsistent with both its terms and the basic policy considerations underlying its enactment.[7]

The Ninth Circuit, in affirming the NLRB decision, effectuated the congressional intent of protecting neutrals[8] although the wording of the statute, when applied to the facts of *Salem*, would seem to demand a contrary result. The precedent upon which the NLRB relied,[9] and which the court quietly adopted, provides, at best, a fragile foundation for the determination reached. It seems to contradict the statutory requirement of "forcing . . . any person . . . to cease doing business with any other person . . ."[10] to hold, as the NLRB and the Ninth Circuit did, that a course of dealing need no longer exist between the primary and secondary employers in order to find that the activity of the union against the secondary employer violates the section.

This note will be limited to a discussion of this resolution of the "threshold issue"[11] of *Salem*. It is submitted at the outset that *Salem* marks a departure from mere statutory interpretation as evidenced by prior court interpretations of section 8(b)(4)(B). In its de-

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[6] *Id.* at 5.

[7] *Id.* at 6.

[8] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 624-27 (1967); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951); National Maritime Union v. NLRB, 346 F.2d 411, 417-19 (D.C. Cir. 1965); Pressmen's Local 46 v. NLRB, 322 F.2d 405, 410 (D.C. Cir. 1963); NLRB v. United Bhd. of Carpenters & Joiners, 184 F.2d 60, 64 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951); 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 80 (1959).

[9] Salem Bldg. Trades Council, 163 N.L.R.B. No. 9, at 5 nn.3-5 (Feb. 20, 1967).

[10] National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1964).

[11] Salem Bldg. Trades Council, 163 N.L.R.B. No. 9, at 6 (Feb. 20, 1967).

sire to carry out the congressional intention of protecting neutrals, the Ninth Circuit, in adopting the NLRB decision, broadened the meaning of "cease doing business" to include "refrain from doing business." Is this a valid interpretation?

Section 8(b)(4)(B)—History and Underlying Congressional Intent

Section 8(b)(4)(B) is the latest embodiment of the congressional intention of "shielding inoffending employers and others from pressures in controversies not their own."[12] This intent of protecting neutrals was originally expressed in section 8(b)(4)(A) of the Taft-Hartley Act.[13] However, the Taft-Hartley provision, which was directed against secondary boycotts,[14] was not entirely effective and Congress passed the Landrum-Griffin Act[15] in 1959 to plug the loopholes.[16] Section 8(b)(4)(A) was redrafted and designated section 8(b)(4)(B). This transformation left the phrase "cease doing business" unaltered. An examination of the previous drafts of both the Taft-Hartley and Landrum-Griffin Acts reveals that Congress did not consider any other word combination as an expression of its intent.[17] This seems to indicate that the situation dealt with in *Salem*—lack of an existing business relationship—was overlooked. This is not an unreasonable oversight. It is difficult to envision a union picketing neutrals who are not doing business with the primary employer to cause them to *refrain* from dealing with him. Yet this is precisely what happened in *Salem*. Had such a case arisen before deliberations took place on the Landrum-Griffin Act, Congress would undoubtedly have substituted "cease *or refrain* from doing business" in

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[12] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

[13] National Labor Relations Act § 8(b)(4), 61 Stat. 141 (1947).

[14] *See* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 363, 428, 547 (1947); 2 *id.* at 1106, 1339, 1341, 1366, 1455.

[15] Labor-Management Reporting and Disclosure Act § 704(a), 29 U.S.C. § 158(b)(4) (1964).

[16] *See* National Woodwork Mfg. Ass'n v. NLRB, 386 U.S. 612, 632-34 (1967); NLRB v. Servette, Inc., 377 U.S. 46, 51-52 (1964); Cohen, *Observations on Two Aspects of Secondary Boycott Cases: Assertion of Jurisdiction by the NLRB and Common Situs Picketing*, 15 J. PUB. L. 220, 223 (1966); Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724, 726-50 (1960); Comment, *Labor Law—Secondary Boycotts—The Effect of the 1959 Amendments to the National Labor Relations Act*, 44 ORE. L. REV. 301, 302-15 (1965).

[17] *See* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 7, 42, 113, 169, 240 (1947); 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 142, 255, 328, 595-96, 681, 751, 929 (1959).

place of "cease doing business."[18] Such a substitution would have made it easy for the NLRB to bring the neutral employers in *Salem* within the section's protection and the case would have never reached the Ninth Circuit. Before this problem arose though, both section 8(b)(4)(B) and its predecessor were by their terms sufficiently general to permit the NLRB and the courts to carry out the broad congressional intention of protecting neutrals where no secondary boycott existed.

Broadening Interpretation of Section 8(b)(4)(B) and Its Predecessor to Protect Neutrals

Section 8(b)(4)(A) was originally aimed at outlawing the secondary boycott.[19] In a typical secondary boycott, a union which has a labor dispute with Employer *A* (the primary employer) applies pressure against *B* (the neutral or secondary employer) in order to force *B* to cease doing business with *A*. Although the legislative history is filled with references to secondary boycotts,[20] Congress chose not to use the term in the section. The courts have construed this as an indication of congressional intention not to limit enforcement of the section to "secondary boycotts" in the strict sense of the term.[21]

It was not long before the courts were faced with union activity which did not conform to a technical "secondary boycott." In 1950[22] the Second Circuit found a violation of the section for activity which was later named a "tertiary boycott."[23] A tertiary boycott differs from a secondary boycott in that the netural employer who is sub-

[18] Congress used the phrase *cease or refrain* in subsection (e), which section 704(b) of the Labor-Management Reporting and Disclosure Act added to National Labor Relations Act § 8, 29 U.S.C. § 158(e) (1964). This seems to indicate that Congress would not have left the word *cease* to represent the phrase *cease or refrain* if it had considered the possibility of a union boycotting persons who were not presently doing business with the primary employer.

[19] See note 14 *supra* and accompanying text.

[20] *See* NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 (1947).

[21] "The mere fact that the language of this Section [8(b)(4)] comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns." National Maritime Union v. NLRB, 346 F.2d 411, 417 (D.C. Cir. 1965). "Congress did not intend to confine the effect of § 8(b)(4) to a strict or precise definition of the term 'secondary boycott'. . . ." National Maritime Union v. NLRB, 342 F.2d 538, 543 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965).

[22] Local 501, IBEW v. NLRB, 181 F.2d 34 (2d Cir.), *aff'd*, 341 U.S. 694 (1950).

[23] Local 450, Operating Eng'rs v. Elliott, 256 F.2d 630, 637 (5th Cir. 1958).

jected to union pressure has no direct business relationship with the primary employer. Instead he is doing business with a second neutral employer who in turn has a business relationship with the primary employer. The union's objective is to force the first neutral to cease dealing with the other neutral who in turn will be forced to cease dealing with the primary employer.[24]

In 1964, section 8(b) (4) (B) was found applicable where a union attempted to compel a secondary employer to *limit* its business dealings with the primary employer. The Seventh Circuit held that "[l]ess than a total cessation of an existing business relationship is within the meaning of 'cease doing business' in § 8(b) (4) (B)."[25]

A year later the scope of the section was broadened further by applying it where the union had a dispute with a rival union rather than with a primary employer.[26] In response to the rival union's boycott of a ship on which members of the first union were employed, the first union boycotted a second ship causing a work stoppage which not only affected members of the rival union but also caused the shipowners, stevedoring companies and other neutral employers to cease dealing with each other. Had the section been limited to secondary boycotts, the lack of a dispute between the union and a primary employer would have been fatal to the neutral employers' case.

Salem would seem merely to be another step in the expansion of the interpretation of section 8(b) (4) (B). Yet is it? Does "cease doing business" encompass "refrain from doing business?" Webster's Third International Dictionary defines "cease" as "discontinue," "terminate," or "halt."[27] "Refrain" is defined as "forbear," "avoid," or "abstain."[28] A recent judicial formulation comparing "cease" and "refrain" is illuminating:

> Unquestionably, the word "cease" implies that the objective referred to has been in existence and is to be stopped. It does not follow, however, that the word "refrain" must be limited to future events exclusively. The concept may be of "refraining" from doing, in the future, that which one is presently doing, but said concept is little

[24] *See* NLRB v. Plumbers Local 157, 369 F.2d 388 (7th Cir. 1966); NLRB v. Carpenters Local 11, 242 F.2d 932 (6th Cir. 1957); NLRB v. Carpenters Local 1976, 241 F.2d 147 (9th Cir. 1957), *aff'd*, 357 U.S. 93 (1958); NLRB v. Teamsters Local 182, 219 F.2d 394 (2d Cir. 1955); Longshoremen Local 1224, 160 N.L.R.B. 732 (1966); Plumbers Local 370, 157 N.L.R.B. 20 (1966).

[25] NLRB v. Milk Wagon Drivers Local 753, 335 F.2d 326, 328 (7th Cir. 1964); *accord*, Retail Clerks Local 1017, 249 F.2d 591, 595 (9th Cir. 1957).

[26] National Maritime Union v. NLRB, 346 F.2d 411 (D.C. Cir. 1965); National Maritime Union v. NLRB, 342 F.2d 538 (2d Cir. 1965), *cert. denied*, 382 U.S. 835 (1965). *See also* NLRB v. Washington-Oregon Shingle Weavers Council, 211 F.2d 149 (9th Cir. 1954).

[27] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 358 (3d ed. 1961).

[28] *Id.* at 1909.

> different from that of "ceasing" to do, in the future, that which one is presently doing. As so used, the words "ceased" and "refrain" may be synonymous . . . . However, there are also contexts in which they are not synonymous . . . (*e.g.*, "refraining" from doing something in the future which is *not* presently being done).[29]

As there was no present business relationship between the neutrals and the primary employer in *Salem*, the example utilized by the court seems directly applicable, and "*cease* doing business" could not, under the facts, include "*refrain* from doing business."

Although the terms "cease" and "refrain" may not always be synonymous there is some authority, by analogy, for the judicial construction of section 8(b)(4)(B) adopted in *Salem*. The NLRB cited *NLRB v. Servette, Inc.*[30] In *Servette* the Supreme Court held that section 8(b)(4)(B) protected a distributor even though the section uses the phrase "producer, processor, or manufacturer," which, if read literally, would not include a distributor. The Court relied upon a history of previous decisions which preceded the 1959 congressional deliberations on the Landrum-Griffin Act and which construed the term "producer" broadly so that it encompassed distributors. It reasoned that Congress was aware of the Court's construction of the term and the congressional failure to alter the wording of the phrase "producer, processor, or manufacturer" when the section was being redrafted constituted an acceptance of that interpretation.[31] This would be analogous to the NLRB's interpretation of "cease doing business" in *Salem* except that there is no prior congressional recognition of the fact that "cease" and "refrain" are synonymous in all their applications.

Effect of Salem on Section 8(b)(4)(B)

By endorsing the NLRB's opinion without comment, the Ninth Circuit provided no clues to indicate how broadly *Salem* should be

[29] Hoffman v. Teamsters Local 38, 230 F. Supp. 684, 691 (N.D. Cal. 1962) (emphasis by the court) (petition for a temporary injunction). But the Ninth Circuit rejected this distinction between "cease" and "refrain" and found, after consideration of the legislative history of § 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), that the terms were commonly treated as synonymous. NLRB v. Teamsters Local 38, 338 F.2d 23, 27 (9th Cir. 1964) (petition for enforcement of NLRB's order). It should be noted, however, that the particular circumstances which led to this conclusion—the unexplained omission of the phrase "or refrain" from one clause of § 8(e) after its inclusion in the original amendment—nowhere appear in the legislative history of § 8(b)(4)(B). It is submitted that the omission in § 8(e) was the result of oversight and not the result of a feeling that "cease" would carry the load of "cease or refrain." Otherwise the use of "refrain" in the section's prior clause would be redundant.

[30] 377 U.S. 46 (1964).

[31] *Id.* at 55-56.

construed.[32] If the holding is construed narrowly, which seems unlikely, a neutral, if not presently dealing with the primary employer, would be required to show a past business relationship with the employer to merit the protection of Section 8(b)(4)(B). As a result, one class of neutrals, persons who had never dealt with, and who were not dealing with the primary employer, would be unprotected.

The alternative, and better construction, would extend the section's protection to all neutrals. This broad construction would recognize that the most logical basis for determining that the section has been violated is not the existence or non-existence of a business relationship, but rather the concept of neutrality. If a party is foreign to the primary dispute, in other words neutral, he should be protected from becoming "enmeshed in controversies not his own."[33] The dispute should be confined to the primary parties and not enlarged by dragging in uninterested persons. This application of *Salem* would best carry out the underlying congressional intention of protecting neutrals and is undoubtedly the path that will be followed by the NLRB and the courts in the future.[34] But whatever course is followed, *Salem* is one more step toward the complete protection of neutrals.

Conclusion

Section 8(b)(4)(B) is an expression of the congressional intention of protecting neutrals by confining labor disputes to the primary parties. Originally aimed at secondary boycotts, the NLRB and the courts have been able to extend its protection to neutrals although they were not victims of a secondary boycott. This result would have been unlikely had Congress lacked the foresight to word the section in general terms, not mentioning "secondary boycott." The Ninth Circuit, in *Salem*, followed the trend and extended protection to neutrals although no secondary boycott existed. It is submitted that this result is commendable. However, to reach it the court adopted the NLRB's determination that "cease" encompasses "refrain." This is more than mere interpretation. Should not Congress have been left the chore of amending section 8(b)(4)(B) to read "cease or re-

[32] *Salem* has been cited in two later NLRB decisions. Twin City Carpenters Council, 167 N.L.R.B. No. 151, at 17 (Oct. 24, 1967); Glaziers Local 558, 165 N.L.R.B. No. 27, at 6 (June 6, 1967). Neither case is directly in point although the first uses the NLRB's determination of the "threshold issue" as an example.

[33] McLeod v. Paper Cutters Local 119, 220 F. Supp. 133, 136 (S.D.N.Y. 1963).

[34] AMERICAN BAR ASSOCIATION, 1967 PROCEEDINGS ON LABOR RELATIONS LAW 188, supports the conclusion that *Salem* extends the protection of section 8(b)(4) to all neutrals.

frain from doing business?" The Supreme Court has said:

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. . . . But in such case the remedy lies with the law making authority, and not with the courts.[35]

Yet, if *Salem* is to be followed, and the congressional intention underlying section 8(b)(4)(B) dictates that it must be,[36] it should be construed broadly. The key to the section's protection should be neutrality—not the existence of a business relationship.

I. S. B.

C. Employers' Free Speech: Prediction Opinion Test—NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753 (9th Cir. 1967).

In July of 1964, a union composed of machinists and aerospace workers[1] held a representation election of production and maintenance workers employed by TRW-Semiconductors, Inc.[2] The union lost the election and filed a complaint with the NLRB[3] alleging that the company was guilty of unfair labor practices under section 8(a)(1) of the National Labor Relations Act which provides: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7."[4] Section 7 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[5]

The trial examiner appointed by the NLRB found that between the time the union had filed a petition with the NLRB for a representation election and the date of the election, the company had distributed 47 notices in the form of bulletins, letters, posters, placards

[35] Crooks v. Harrelson, 282 U.S. 55, 60 (1930).

[36] See text accompanying notes 32-34 *supra*.

[1] International Association of Machinists and Aerospace Workers, AFL-CIO. NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 755 (9th Cir. 1967).

[2] This company, located in southern California, is a subsidiary of TRW, Inc. The company employs approximately 700 employees, mainly female. *Id.*

[3] TRW Semiconductors, Inc., 159 N.L.R.B. 415 (1966).

[4] Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(1), 61 Stat. 140 (1947).

[5] § 7, 61 Stat. 140 (1947).

and leaflets to the employees designed to inform them of the company's opposition to the union.[6] The trial examiner and the Board concluded that certain actions of the company constituted violations of section 8(a)(1).

Specifically, the trial examiner found that the company had violated the Act in a pre-election speech given by the company's vice president and general manager in which the employees were warned: "No one can assume that if an outside union gets into our company that all the fine things we now enjoy would *automatically* be continued. If we should be forced into negotiation with the union, *the company would have to begin from scratch and bargain hard* to protect our competitive position."[7] The trial examiner, following *NLRB v. Marsh Supermarkets, Inc.*[8] which held statements made by an employer that employees would lose existing benefits were violations of section 8(a)(1) of the Act, found this statement an unlawful interference with the rights of the employees under the Act. The trial examiner noted that in the *Marsh* case the employer had stated that employees "would lose" existing benefits but that in the present case the employer had not made a positive declaration that they "would lose" these benefits. The trial examiner stated: "Nevertheless, [the] presumption can hardly be considered warranted that . . . respondent's workers possessed the capacity to make semantic distinctions worthy of some Byzantine logomach. . . . [The] language was clearly calculated to convey a message that their current fringe benefits would certainly be jeopardized . . . ."[9] The trial examiner found that these statements constituted threats of economic loss and reprisal designed to "trigger responses bottomed on fear" in the violation of the Act.[10]

The trial examiner found violations of the Act in statements that "[employees] may find themselves out of a job because they said something or did something that displeases the union bosses."[11] The trial examiner noted that the employer's message, although "not couched in specifically coercive terms, reflects a threat bottomed upon . . . serious misrepresentations."[12] As such, it possessed a "coercive thrust meriting statutory interdiction."[13]

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[6] TRW Semiconductors, Inc., 159 N.L.R.B. 415, 417 (1966) (Trial Examiner's Report).

[7] *Id.* at 421.

[8] 327 F.2d 109 (7th Cir. 1963), *cert. denied*, 377 U.S. 944 (1964).

[9] TRW Semiconductors, Inc., 159 N.L.R.B. 415, 426 (1966) (Trial Examiner's Report).

[10] *Id.*

[11] *Id.* at 421.

[12] *Id.* at 424.

[13] *Id.* at 425.

The trial examiner also found violations of the Act in the company's statements and notices linking the union with physical violence. In the company newspaper the employer published photographs of strikes by other unions with headings and stories designed to associate the union involved in this case with the depicted violence. Notices were posted by the company on the day of the election which read, "Threatened Violence Will Not Be Tolerated." These statements were found by the trial examiner to "contain misrepresentations of facts and conclusions, calculated to link the alleged threats of violence to the union and thus buttress [the company's] campaign to associate unions with violence."[14]

The Board adopted the findings of the trial examiner and directed that a cease and desist from unfair labor practices order be issued against the employer.[15] The Board, in *NLRB. v. TRW-Semiconductors, Inc.*,[16] petitioned the Ninth Circuit for enforcement of its cease and desist order. The Ninth Circuit, Judge Duniway delivering the opinion, reversed the Board and held that the company's statements were not in violation of the NLRA.[17]

NLRA and Free Speech

The provisions of section 8(a)(1) of the NLRA forbidding employers from interfering with, restraining, or coercing employees in the exercise of their rights under the Act necessarily places restrictions upon the freedom of expression of employers. The issue may be raised whether these restrictions placed upon the employer constitute an abridgment of freedom of speech guaranteed by the first amendment to the Constitution.

In dealing with any problem involving free speech, it is essential to recognize that the first amendment rights are not viewed by the courts as absolute, but rather are viewed as rights which may be qualified by surrounding circumstances.[18] In labor relations matters, individual rights of freedom of expression must be weighed against the public interest in providing workers with the right freely to elect or reject collective bargaining.[19] While the value of collective

[14] NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 757 (9th Cir. 1967).

[15] TRW Semiconductors, Inc., 159 N.L.R.B. 415 (1966).

[16] 385 F.2d 753 (9th Cir. 1967).

[17] *Id.*

[18] Dennis v. United States, 341 U.S. 494, 508 (1951), where the Court stated: "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature." *See* Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

[19] NLRB v. Herman Wilson Lumber Co., 355 F.2d 426 (8th Cir. 1966) (dissenting opinion).

bargaining continues to be the subject of conflicting opinions, the position of the federal government has not been one of neutrality.[20] The passage of the Wagner Act[21] in 1935 guaranteed workers the right to organize and assert collective strength. In balancing the rights of employees against the rights of employers it has been asserted that "[n]either the Act nor the Constitution tolerates an abridgment of the right of an employer to communicate with his employees *so long as* he does not attempt to infringe the rights of his employees as guaranteed by the Act."[22]

The courts have concluded that the constitutional guarantee of free speech entitled the employer to express his views and opinions upon matters of interest to his employees and himself and that the provisions of section 8(a)(1) do not forbid him from making such expressions.[23] However, where the employer's statements go beyond the mere expression of opinion and constitute an attempt to coerce or intimidate employees by threats of reprisal, such expressions are not protected by the first amendment or by the Act.[24] The courts have held that employers may not use the free speech provisions of the first amendment as a shield from behind which they may coerce and intimidate employees.[25] As one author has pointed out in this regard, there is "no constitutional right of coercion."[26]

The issue, therefore, is not whether section 8(a)(1) constitutes an unconstitutional limitation upon freedom of speech, but rather

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[20] *E.g.*, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 2 (1947); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 96-98 (1954).

[21] National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151-68 (1964).

[22] NLRB v. Bangor Plastics, Inc., 392 F.2d 772, 775 (6th Cir. 1967) (emphasis added).

[23] *E.g.*, NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941); NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967); NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753 (9th Cir. 1967); NLRB v. Clark Bros. Co., 163 F.2d 373, 376 (2d Cir. 1947); Edward G. Budd Mfg. Co. v. NLRB, 142 F.2d 922, 926 (3d Cir. 1944). The Ninth Circuit, shortly after the adoption of the Act, stated that had the Act prohibited such expression of opinion, it would have been unconstitutional. NLRB v. Union Pac. Stages, Inc., 99 F.2d 153, 178 (9th Cir. 1938).

[24] See section 8(c), quoted in text accompanying note 45 *infra*, which specifically provides that an expression which does not constitute a threat or reprisal is not a violation of section 8(a)(1). For some cases dealing with the question whether employer statements went beyond the mere expression of opinion, see note 70 *infra*.

[25] NLRB v. La Salle Steel Co., 178 F.2d 829, 835 (7th Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); NLRB v. Glenn L. Martin-Nebraska Co., 141 F.2d 371, 373 (8th Cir. 1944).

[26] Note, *The Coercive Character of Employer Speech: Context and Setting*, 43 GEO. L.J. 405, 414 (1955).

whether a particular statement is within the protection of the first amendment and the provisions of the Act. As the Ninth Circuit stated in *NLRB v. TRW-Seciconductors, Inc.*,[27] the test employed to determine whether the challenged statement violates the Act is, as set forth in section 8(c) of the Act, whether the material "contains a threat of force or reprisal or promise of benefit by the employer."[28] The conflict of opinion between the NLRB and the Ninth Circuit in *TRW-Semiconductors* appears to result from a difference in their respective methods of determining whether the statements in controversy constituted a prohibited "threat." A primary purpose of this note is to focus attention upon this difference.[29]

Wagner Act

Prior to the enactment of the Wagner Act in 1935, neither statute nor common law restricted what an employer might lawfully say to his employees in the course of a labor dispute.[30] The Wagner Act, by bringing labor relations matters under the jurisdiction of the NLRB, provided a variety of restrictions against management's interference with the employees' choice to adopt or to reject collective bargaining. Section 8(a)(1) encompassed restrictions upon threats or coercive statements made to employees to induce them to reject unionization.[31] At the time of the enactment of section 8(a)(1), there appears to have been little concern as to the effect this legislation might have on the employer's free speech. This is evidenced by the fact that an amendment to the Act expressly protecting the employer's right to freedom of speech was rejected by Congress.[32]

The NLRB's first five years of administration of the Wagner Act has prompted the observation that the Board at that time was "oblivious to the proposition that an employer might have a constitutional

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[27] 385 F.2d 753 (9th Cir. 1967).

[28] *Id.* at 759.

[29] For discussion of some of the issues raised, see Bok, *The Regulation of Campaign Tactics in Representation Elections under The National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243 (1963); Cox, *Some Aspects of the Labor Management Relations Act, 1947* (2 pts.), 61 HARV. L. REV. 1, 274 (1947); Kirby, *Constitutional Issues in Labor Law: A Symposium*, 63 NW. U.L. REV. 1 (1968); Pokempner, *Employer Free Speech under the National Labor Relations Act*, 25 MD. L. REV. 111 (1965); Note, *Section 8(c): The Necessity For a Balancing of Interests*, 56 GEO. L.J. 630 (1968); 1968 DUKE L.J. 401; 2 GA. L. REV. 126 (1968).

[30] Christensen, *supra* note 29, at 255.

[31] See text of section 8(a)(1) accompanying note 4 *supra*.

[32] H.R. REP. No. 1371, 74th Cong., 1st Sess. 6 (1935); Christensen, *supra* note 29, at 255.

right to express opposition to unionization of his employees."[33] Management was considered to have no legitimate interest in whether its employees selected collective bargaining representatives.[34] The employer was required to maintain strict neutrality on the theory that his superior economic position "carrie[d] such weight and influence that his words [might] be coercive when they would not be so if the relation of master and servant did not exist."[35]

Although the NLRB adopted the proposition that an employer must maintain strict neutrality during the selection of collective bargaining representatives, the circuit courts were split on this issue.[36] In contrast to the Board's position on strict neutrality, the Ninth Circuit in 1938 stated: "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment."[37] The Sixth Circuit made a similar objection to the Board's position.[38]

From Virginia Electric to Taft-Hartley (1941-47)

In 1941, the United States Supreme Court expressly rejected the notion that employers were obliged under the NLRA to maintain strict neutrality. In *NLRB v. Virginia Electric and Power Co.*,[39] the Supreme Court stated: "The employer . . . is . . . free . . . to take any side it may choose . . . ."[40]

The Court in *Virginia Electric*, however, did not reject the strict neutrality doctrine without qualification. By its statement that "[i]f the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act,"[41] the Court provided guidelines for determining whether the employer had violated the Act. Under the totality of activities test set forth in *Virginia Electric*, the right of the employer to express his opinion regarding unionization was protected so long as his total conduct did not restrain or coerce his em-

33 Christensen, *supra* note 29, at 255.

34 *Id.*

35 NLRB v. Falk Corp., 102 F.2d 383, 389 (7th Cir. 1939), *rev'd on other grounds*, 308 U.S. 453 (1940).

36 For cases supporting and rejecting the neutrality requirement in the early years of the NLRB, see Note, *Limitations upon an Employer's Right of Noncoercive Speech*, 38 VA. L. REV. 1037, 1039 nn.8-12 (1952).

37 NLRB v. Union Pac. Stages, Inc., 99 F.2d 153, 178 (9th Cir. 1938).

38 Midland Steel Prods. Co. v. NLRB, 113 F.2d 800, 804 (6th Cir. 1940).

39 314 U.S. 469 (1941).

40 *Id.* at 477.

41 *Id.*

ployees. Speech, therefore, which did not by its own terms contain any threats or promises in violation of the Act, might be prohibited if the total activities of the employer, including the speech, restrained the rights of employees under the Act.[42]

The Board, in the wake of the *Virginia Electric* decision rejecting the strict neutrality doctrine, proceeded to push the totality of activities test to unacceptable extremes. For example, in some cases the Board found that innocuous statements by employers were violations of the Act because of some unrelated past activity of the employer.[43] This practice generated concern among legislative leaders, and this concern led to the enactment in 1947 of section 8(c)[44] of the National Labor Relations Act. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of a unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[45]

Thus, section 8(c), in effect, incorporated the position of the Supreme Court in *Virginia Electric* into the Act by providing that the employer's expression of opinion did not constitute an unfair labor practice if such expression did not contain a prohibited threat.[46]

While the legislative history of section 8(c) clearly suggests a concern for protecting the employer's constitutionally guaranteed rights of free expression, neither the Act itself nor the legislative record provides precise guidelines which enable the Board and the courts to apply section 8(c) to specific cases.[47] Although the legislative record indicates a dissatisfaction with the Board's broad application of the totality of activities test,[48] there is nothing to suggest that Congress intended the other extreme, that no consideration be given to

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[42] *Id.*

[43] *See, e.g.*, Peter J. Schweitzer, Inc. v. NLRB, 144 F.2d 520 (D.C. Cir. 1944); Edward G. Budd Mfg. Co. v. NLRB, 142 F.2d 922, 928 (3d Cir. 1944).

[44] "The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law." Congressional Comments, U.S. CODE CONGRESSIONAL SERVICE, 80th Congress, 1st Sess. 1151 (1947); *see* S. REP. No. 105, 80th Congress, 1st Sess. 23-24 (1947).

[45] Labor Management Relations Act (Taft-Hartley Act) 61 Stat. 136, 142 (1947), *amending* National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935).

[46] 314 U.S. at 477.

[47] *E.g.*, Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966). The Supreme Court stated in that case: "Our task is rendered more difficult by the failure of the Congress to furnish precise guidance in either the language of the Act or its legislative history." *Id.* at 58.

[48] *See* note 44 *supra.*

any expression not coercive on its face.[49] Congress rejected a House of Representatives version of the proposed amendment which would have required that a prohibited statement "by its own terms" contains a threat of force or economic reprisal.[50] Congress, however, also rejected a Senate version which provided that statements must under "all the circumstances" contain no threat.[51] The express language of section 8(c), therefore, provides no guidance in determining whether the challenged statements should be examined in light of surrounding circumstances or whether they should be read standing alone.

From the adoption of the Taft-Hartley Act in 1947 to the early 1960's, the totality of activities doctrine was given limited, if any, application.[52] The Board, particularly under the Eisenhower Administration, tended to examine challenged statements in isolation from other expressions or activities of the employer.[53] Under the Kennedy and Johnson Administrations, however, the Board began to emphasize the context of the employer's statements.[54] As will be discussed, a number of the circuit courts have followed the Board's position and have both revived and re-affirmed the totality of circumstances test set forth in *Virginia Electric*.[55]

Prediction, Opinion, or Threat?

In their efforts to develop fairly consistent methods for determining whether a particular statement by an employer falls within the protection of section 8(c) and the first amendment to the Constitution, or is prohibited by the Act, a number of the courts have distinguished between statements which are merely the opinion or prediction of the employer of the "dire economic consequences"[56] which may accompany unionization, and statements which constitute pro-

[49] *See* Cox, *supra* note 29, at 17; Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 24 GEO. WASH. L. REV. 339, 411 (1960).

[50] H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947).

[51] S. REP. No. 105, 80th Cong., 1st Sess. 23-24 (1947). The fact that Congress otherwise adopted the proposed House version of the amendments lends some support to the contention that they did not intend to restrict the analysis to the bare statement. Further, the silence of the amendment on this issue might suggest an intention to leave the law as it had previously been applied—giving consideration to the surrounding circumstances.

[52] *E.g.*, Christensen, *supra* note 29, at 258; *see* Note, *The Coercive Character of Employer Speech: Context and Setting*, 43 GEO. L.J. 405, 411-16 (1955).

[53] Christensen, *supra* note 29, at 258.

[54] *Cf.* TRW Semiconductors, Inc., 159 N.L.R.B. 415 (1966); Christensen, *supra* note 29, at 258.

[55] See note 70 *infra*.

[56] Texas Indus., Inc. v. NLRB, 336 F.2d 128, 130 (5th Cir. 1964).

hibited threats under the Act.[57] In reversing the findings of the trial examiner and the Board in *TRW-Semiconductors*, the Ninth Circuit utilized the "prediction-opinion" test:

> The literature and the speech, insofar as violence and strikes are concerned, are but predictions of what the union might or would do. As such, we think they fall squarely within the protection of section 8(c), even though they might well produce, in the minds of employees, fears of violence.[58]

The court further stated: "The mere fact that campaign propaganda may induce fear—and be intended to produce fear—does not deprive it of the protection of section 8(c)."[59] In contrast, the trial examiner found that the employer's statements contained a prohibited threat because, although generally couched in non-coercive language, the statements were coercive and unlawful because they were delivered in a context reasonably intended and calculated to produce fear of loss of economic benefits in the event of unionization.[60]

The conflict between the Ninth Circuit's conclusions, which were reached by using the "prediction-opinion" analysis, and the Board's conclusions, which were reached by using the contextual or totality of activities approach, results in part from an assumption underlying the Ninth Circuit's "prediction-opinion" analysis. This assumption is that individual phrases of an employer's speech may be "wrenched from the context of the entire speech, from the setting in which the speech is given, and from the entire course of conduct which the speech may illustrate and serve to advance."[61] The weakness in this assumption is that statements made in the course of labor relations, like statements in any other context, take their meaning from the circumstances in which they are enmeshed. As Judge Sobeloff of the Fourth Circuit stated in a section 8(a)(1) case:

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[57] *E.g.*, Jervis Corp. v. NLRB, 387 F.2d 107, 112 (6th Cir. 1967) (threat); NLRB v. J. Weingarten, Inc., 339 F.2d 498, 501 (5th Cir. 1964) (prediction); NLRB v. Transport Clearings, Inc., 311 F.2d 519, 523-24 (5th Cir. 1962) (economic prophecy).

[58] NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 759 (9th Cir. 1967); *see* Don the Beachcomber v. NLRB, 390 F.2d 344, 345 (9th Cir. 1968) (prediction).

[59] NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760 (9th Cir. 1967).

[60] TRW Semiconductors, Inc., 159 N.L.R.B. 415, 423-24 (1966) (Trial Examiner's Report); *accord*, Wausau Steel Corp. v. NLRB, 377 F.2d 369, 372 (7th Cir. 1967): "While we do not doubt that [the employer] proceeded carefully in attempting to limit his communications to his employees to the legally permissible, his words must be judged by their likely import to his employees." NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 432 (8th Cir. 1966) (dissenting opinion): "While [the employer] may have been careful to couch his language in terms of prediction, or statement of legal position . . . they could be construed to threaten inevitable loss of jobs following Union certification."

[61] Christensen, *supra* note 29, at 273.

> [S]omething said in one context may be entirely permissible while in a different situation the same statement may be forbidden and even render the speaker subject to punishment. Thus, in Justice Holmes's classic example, a false cry of fire, conceivably tolerable in some places, will not be protected if shouted in a crowded theatre.[62]

Likewise, a statement made in terms of opinion by an employer in the midst of a heated anti-union campaign must be interpreted as part of the total setting and not as an isolated statement.

In *theory*, the "prediction-opinion" test protects the right of the employer merely to point out the adverse consequences which might result from unionization. It thereby permits him to contribute "information" which is clearly pertinent to the decision-making of the employee. In *practice*, however, this analysis and classification may permit the knowledgeable employer to evade the prohibitions of the Act by carefully couching his statements in non-coercive "opinions."[63]

In an age of fairly sophisticated relations between labor and management, experienced management personnel are generally careful to avoid overt violations of section 8(a) (1) through blatant statements.[64] Yet, as the Fifth Circuit has stated: "Veiled threats, as well as direct threats, of economic reprisal against union activity have been held violative of [section] 8(a) (1)."[65] The employer who is careful to phrase his threats of economic reprisal in terms of opinion or prediction may be able to make statements designed to coerce and induce fear in the minds of his employees and still remain within the protection of section 8(c).[66] The net result may be a subversion of the labor policy embodied in the NLRA under the guise of protection of free speech.[67] Furthermore, if the position

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[62] Kayser-Roth Hosiery v. NLRB, 388 F.2d 979, 981 (4th Cir. 1968) (special concurrence); *accord*, Schenck v. United States, 249 U.S. 47, 52 (1919); *see* Ginzburg v. United States, 383 U.S. 463, 470 (1966).

[63] Professor Bok points out that the classification in practice has given "hostile employers great leeway to indulge in dire predictions in order to dissuade the employees from supporting the union." Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relation Act*, 78 HARV. L. REV. 38, 75 (1964).

[64] One article has suggested that the increased number of cases in which employer speech has been sustained as prophecy may be due partly to the fact that employers have learned to bring their statements within these rules. Wollett & Rower, *Employer Speech and Related Issues*, 16 OHIO ST. L.J. 380, 386 (1955).

[65] NLRB v. Borden Co., 392 F.2d 412, 414 n.4 (5th Cir. 1968); *accord*, NLRB v. Drivers Local 886, 235 F.2d 105, 108 (10th Cir. 1956).

[66] *E.g.*, NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 759, 760 (9th Cir. 1967).

[67] A House of Representatives Minority Report expressed a similar concern at the time of the enactment of section 8(c): "[T]he laudable purpose of protecting free speech cloaks an evil design to encourage unfair labor practices by employers." H.R. REP. No. 245, 80th Cong., 1st Sess. 84-85 (1947).

taken by the Ninth Circuit in *TRW-Semiconductors*, that "[s]ection 8(c) does not protect only those views, arguments or opinions that are correct, nor does it forbid them because they may be demonstrably incorrect,"[68] is maintained, then employers may have great leeway in "predicting" the consequences of unionization.

While the Ninth Circuit in *TRW-Semiconductors*, has reaffirmed its adherence[69] to the "prediction-opinion" test, a majority of the circuit courts in their recent decisions have placed emphasis upon the need to examine employer statements in the context of the totality of activities surrounding the statement.[70] As the Fourth Circuit stated: "The fact that . . . statements considered alone and out of the context in which they were made may not amount to threats of economic reprisal is of no moment because their effect must be considered in toto."[71]

The conflict between those courts that have continued to limit their examination of employer statements to the "prediction-opinion" analysis and those courts that have emphasized the necessity of examining the totality of activities is clearly illustrated by the conflicting statements of the Fifth and Fourth Circuits. The Fifth Circuit, which adheres to the "prediction-opinion" test,[72] stated: "[W]e agree with the Trial Examiner that 'since no part [of the speech] violates the right of free speech, it would be difficult to find that the sum of all its parts constitutes threats or promises to employees, or is coercive respecting their rights to support or not support the Union'."[73] In contrast, the Fourth Circuit stated: "Even if we assume that each of the key statements . . . considered separately would be lawful . . . it

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[68] 385 F.2d 753, 760 (9th Cir. 1967).

[69] In a subsequent case, Don the Beachcomber v. NLRB, 390 F.2d 344 (9th Cir. 1968), the court followed its analysis in *TRW-Semiconductors*.

[70] *E.g.*, Serv-Air, Inc. v. NLRB, 395 F.2d 557, 561 (10th Cir. 1968); NLRB v. Kolmar Laboratories, Inc., 387 F.2d 833, 836 (7th Cir. 1967); Dayco Corp. v. NLRB, 382 F.2d 577, 579 (6th Cir. 1967); J.P. Stevens & Co., v. NLRB, 380 F.2d 292, 302-03 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967); Wausau Steel Corp. v. NLRB, 377 F.2d 369, 372 (7th Cir. 1967); Corrie Corp. v. NLRB, 375 F.2d 149, 153 (4th Cir. 1967); Metropolitan Life Ins. Co. v. NLRB, 371 F.2d 573, 580 (6th Cir. 1967); NLRB v. McCormick Concrete Co., 371 F.2d 149, 152 (4th Cir. 1967); Amalgamated Clothing Workers v. NLRB, 365 F.2d 898, 910 (D.C. Cir. 1966); Teamsters Local 728 v. NLRB, 364 F.2d 682, 684 (D.C. Cir. 1966); NLRB v Herman Wilson Lumber Co., 355 F.2d 426, 429 (8th Cir. 1966); Daniel Constr. Co. v. NLRB, 341 F.2d 805, 811 (4th Cir.), *cert. denied*, 382 U.S. 831 (1965).

[71] NLRB v. McCormick Concrete Co., 371 F.2d 149, 152 (4th Cir. 1967).

[72] *See, e.g.*, Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967). For a critical analysis of the Fifth Circuit's holding in the *Southwire* case, see Note, *Section 8(c): The Necessity For A Balancing of Interests*, 56 GEO. L.J. 630 (1968).

[73] Russell-Newman Mfg. Co. v. NLRB, 370 F.2d 980, 982 (5th Cir. 1966), *quoting* Russell-Newman Mfg. Co., 153 N.L.R.B. 1312, 1319 (1965).

still does not follow that we must accept the proposition pressed upon us by the company. [It] may have accurately stated an accepted rule of mathematics [that the whole cannot be greater than the sum of its parts], but words and speech are not governed entirely by mechanical mathematical concepts."[74]

Conclusions

In determining whether a particular pronouncement has a reasonable[75] or likely[76] tendency to intimidate employees in their exercise of rights under the NLRA, a growing number of the circuit courts[77] have acknowledged the necessity of looking beyond the formal phrasing of a statement and examining the "circumstances in which the language is used and . . . the ears to which it is directed."[78] The Ninth Circuit, however, in reversing the findings of the NLRB in *TRW-Semiconductors*, held that statements couched in terms of prediction were protected under the Act even though they might induce and be intended to induce fear in the employees.[79]

The "prediction-opinion" test used by the Ninth Circuit in reversing the Board is technically correct, that is to say, employers *are* free to make statements or express opinions in labor relations matters which do not constitute threats or promises in violation of the Act.[80] The Ninth Circuit, however, clearly is not within the majority view in determining whether a statement is a prohibited threat or a protected opinion when it rigidly adheres to a system of classification which holds a statement protected simply because the employer has been careful to phrase it in permissible terms where that statement is, in fact, likely to induce, and intended to induce, fear in the employees.

The totality of activities analysis and the "prediction-opinion" test are not mutually exclusive approaches; indeed, the totality of activities test as first presented by the Supreme Court in *Virginia Electric* impliedly contained the "prediction-opinion" test.[81] The difficulty arises when a court attempts to utilize the prediction-opinion

[74] Daniel Constr. Co. v. NLRB, 341 F.2d 805, 811 (4th Cir), *cert. denied*, 382 U.S. 831 (1965).

[75] Dayco Corp. v. NLRB, 382 F.2d 577, 580 (6th Cir. 1967); Corrie Corp. v. NLRB, 375 F.2d 149, 153 (4th Cir. 1967).

[76] NLRB v. Kolmar Laboratories, Inc., 387 F.2d 833, 837 (7th Cir. 1967).

[77] Cases cited note 70 *supra*.

[78] NLRB v. Golub Corp., 388 F.2d 921, 929 (2d Cir. 1967) (dissenting opinion).

[79] 385 F.2d 753, 760 (9th Cir. 1967).

[80] See section 8(c) in text accompanying note 45 *supra*.

[81] In *Virginia Electric*, the Court recognized the right of the employer to express an opinion which did not restrain or coerce the employees in the totality of circumstances. *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941).

test without examining the entire surroundings of the expression. Words and expressions necessarily take their meaning from the surroundings in which they are found, and the surroundings may transform a statement couched in terms of prediction into a real threat.

In *TRW Semiconductors*, the trial examiner found that the employer's non-coercive terms were transformed by the surrounding circumstances into coercive expressions meriting statutory interdiction.[82] Section 10(e)[83] of the Act provides that the findings of the Board are to be sustained where supported by substantial evidence,[84] even though the court might reach an opposite conclusion in a de novo proceeding.[85] The Ninth Circuit's obligation in *TRW-Semiconductors* was simply to determine whether there was substantial evidence to support the Board's conclusions. Under the totality of activities doctrine, the court was not obliged to limit its examination to the mere formal phraseology of the employer's statements to determine if the Board's finding of a violation was supported by substantial evidence. Had the court, as the trial examiner clearly did, utilized the totality of activities doctrine, it might easily have found that there was substantial evidence to show that the employer's predictions and opinions actually constituted prohibited threats.

In order to effectuate the policy of the NLRA and to provide freedom from coercion and intimidation in the decision of employees to elect or reject collective representations, it is essential that the Ninth Circuit utilize the *Virginia Electric* totality of activities doctrine when it examines Board holdings to determine whether they are supported by substantial evidence. Congress has entrusted to the particular expertise of the NLRB the burden of protecting the rights of both employers and employees under the National Labor Relations Act. The determination of the NLRB that an expression of an employer has violated the provisions of the Act should not be reversed merely because the employer's threat has been couched in terms of opinion or prediction. Rather than attempting to fit employer's statements into pre-conceived categories which may ignore the more subtle implications of the expression in the context in which they have been delivered, what is called for is a careful case-by-case determination of whether the challenged material can reasonably be construed to carry a prohibited threat to induce employees to reject the union.

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[82] TRW Semiconductors, Inc., 159 N.L.R.B. 415, 423-24 (1966) (Trial Examiner's Report).

[83] 29 U.S.C. § 160(e) (1964).

[84] Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

[85] NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 279 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

D. Evidentiary Use of Prior Unfair Labor Practices—NLRB v. Macmillan Ring-Free Oil Co., 394 F.2d 26 (9th Cir. 1968).

Section 10(b) of the National Labor Relations Act is a statute of limitations which bars the National Labor Relations Board from bringing an action against a party charged with an unfair labor practice under the Act if the charge is based on unfair labor practices occurring six months prior to the filing of the charge with the NLRB.[1] Section 10(b) does not mention how much weight, if any, may be given to evidence of unfair labor practices occurring prior to the limitations period in a later NLRB proceeding. But the section has been construed to include a restriction on the admissibility of such evidence as well as a time limitation for the filing of an unfair labor practice charge.[2]

There has been little discussion in the cases as to the weight to be given evidence of prior unfair labor practices when a party is subsequently charged with violating the same unfair labor practice provision of the National Labor Relations Act. This problem is particularly acute where the NLRB can find only insubstantial evidence during the limitations period of such a violation. Two recent federal cases have dealt specifically with this question. *Local 1424, International Association of Machinists [IAM] v. NLRB*[3] concerned two such situations and, by dictum, recognized a third situation in which a different effect should be given the statute of limitations because of differences in the quantum of evidence found within the limitations period. The recent decision of *NLRB v. MacMillan Ring-Free Oil Company*,[4] by expressly ruling on this third situation, completes

[1] National Labor Relations Act, § 10(b), 29 U.S.C. § 160(b) (1964) [hereinafter cited as NLRA]: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

[2] Prior to 1960, it was the established rule in NLRB decisions and federal cases that section 10(b) was only a statute of limitations, and not rule of evidence. *See, e.g.*, NLRB v. Clausen, 188 F.2d 439, 443 (3d Cir.), *cert. denied*, 342 U.S. 868 (1951); Paramount Cap Mfg. Co., 119 N.L.R.B. 785, 787 (1957), *enforced*, 260 F.2d 109, 112 (8th Cir. 1958); *In re* Axelson Mfg. Co., 88 N.L.R.B. 761, 766 (1950).

The Supreme Court of the United States rejected this construction in *Local 1424, IAM v. NLRB* stating, "we think that permitting resort to the principle that Section 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section." Local 1424, IAM v. NLRB, 362 U.S. 411, 419 (1960). The Ninth Circuit's decision in *MacMillan* reaffirms the position that section 10(b) is both a rule of evidence and a statute of limitations. NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 33 (9th Cir. 1968).

[3] 362 U.S. 411 (1960).

[4] 394 F.2d 26 (9th Cir. 1968).

the application of section 10(b) to the various evidentiary situations possible.

In *Local 1424, IAM*, the Supreme Court recognized three different situations in considering the extent to which events antedating the six-month limitations period could be used as evidence to determine whether conduct within the limitations period constituted an unfair labor practice.[5] In its approach to the question of section 10 (b)'s application to the admissibility of evidence originating before the six-month period, the Supreme Court said:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.[6]

In other words, if the NLRB finds *substantial* evidence of an unfair labor practice within the limitations period, the Board may consider evidence of prior unfair labor practices to determine whether an unfair labor practice occurred within the limitations period.[7] In the second situation mentioned by the Supreme Court,[8] where *no* evidence of an unfair labor practice is found within the limitations

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[5] Local 1424, IAM v. NLRB, 362 U.S. 411, 416-17, 421 (1960).

[6] *Id.* at 416-17.

[7] The holding in the first situation is well supported by NLRB and lower federal court decisions. *See, e.g.*, NLRB v. Murray Ohio Mfg. Co., 326 F.2d 509, 511 (6th Cir.), *enforced*, 328 F.2d 613 (1964); NLRB v. General Shoe Corp., 192 F.2d 504, 507 (6th Cir.), *cert. denied*, 343 U.S. 904 (1951); NLRB v. Clausen, 188 F.2d 439, 443 (3d Cir.), *cert. denied*, 342 U.S. 868 (1951); Armco Drainage & Metal Prods., Inc., 106 N.L.R.B. 725, 730 (1953); Sharples Chem., Inc., 100 N.L.R.B. 20, 30 (1952); *In re* Axelson Mfg. Co., 88 N.L.R.B. 761, 765-66 (1950).

[8] The holding in the second situation is also well established by NLRB and lower federal court decisions. *See, e.g.*, NLRB v. Textile Mach. Works, 214 F.2d 929, 933-34 (3d Cir. 1954); NLRB v. Childs Co., 195 F.2d 617, 621 (2d Cir. 1952); Bowens Prods. Corp., 113 N.L.R.B. 731, 732 (1955); *In re* Knickerbocker Mfg. Co., 109 N.L.R.B. 1195, 1196 (1954); Bonwit Teller, Inc., 96 N.L.R.B. 608, 610 (1951); Greenville Cotton Oil Co., 92 N.L.R.B. 1033, 1034 (1950), *aff'd*, 197 F.2d 451, 453 (5th Cir. 1952); *In re* Goodall Co., 86 N.L.R.B. 814, 844 (1949).

period, the NLRB may not give independent and controlling weight to evidence of prior unfair labor practices to find a violation within the six-month period.[9] It is well established, however, that such prior evidence of unfair labor practices is admissible as background evidence to show the nature of the relationship between the parties.[10]

The effect of the holding in the second situation described above is a rejection of the "continuing tort"[11] or "continuing violation" doctrine[12] in unfair labor practice cases where no evidence of such a violation is found within the limitations period. Under the continuing tort doctrine, where there is evidence to establish an unfair labor practice prior to the limitations period against the party charged, an unfair labor practice is said to continue into the present limitations period even if no acts or evidence within the six-month period can support the violation.[13] The same theory applies to an employer's motivation.[14] The company or union may rebut the inference that such prior conduct continued into the present time period by producing evidence to show that its earlier conduct or motive has not continued.[15]

In light of the rejection of the continuing tort doctrine, the third situation discussed by the Supreme Court in *Local 1424, IAM* becomes important. That situation is where *insubstantial* evidence—as contrasted to substantial or to no evidence—of an unfair labor practice is found within the limitations period.[16]

In *NLRB v. MacMillan Ring-Free Oil Company*,[17] the Ninth Circuit specifically addressed itself to this third situation, which was raised in the dictum of *Local 1424, IAM*. The NLRB found that the company had violated subsections 8(a)(1) and 8(a)(5) of the National Labor Relations Act[18] by failing to bargain in good faith with the certified bargaining representative of its production and maintenance employees, the Oil, Chemical, and Atomic Workers International Union, AFL-CIO.[19] The company's refusal to bargain was established as

[9] Teamsters Union, 121 N.L.R.B. 727, 738 (1958).

[10] *See, e.g.*, Superior Engraving Co. v. NLRB, 183 F.2d 783, 791 (7th Cir. 1950); News Printing Co., 116 N.L.R.B. 210, 212 (1956); Universal Oil Prods. Co., 108 N.L.R.B. 68, 69-70 (1954); Greenville Cotton Oil Co, 92 N.L.R.B. 1033, 1034 (1950), *aff'd*, 197 F.2d 451, 453 (5th Cir. 1952).

[11] *See* NLRB v. Pennwoven, Inc., 194 F.2d 521, 526 (3d Cir. 1952).

[12] *See* Local 1424, IAM v. NLRB, 362 U.S. 411, 422-23 (1960).

[13] NLRB v. Southern Transp., Inc., 355 F.2d 978, 981 (8th Cir. 1966); *see* Retail Clerks Local 344, 136 N.L.R.B. 1270, 1289 (1962).

[14] *See* News Printing Co., 116 N.L.R.B. 210 (1956).

[15] *See* Retail Clerks Local 344, 136 N.L.R.B. 1270, 1275, 1289 (1962).

[16] Local 1424, IAM v. NLRB, 362 U.S. 411, 421 (1960).

[17] 394 F.2d 26 (9th Cir. 1968), *reversing* 160 N.L.R.B. 877 (1966).

[18] NLRA §§ 8(a)(1), (5), 29 U.S.C. §§ 158(a)(1), (5) (1964).

[19] NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 27-28 (9th Cir. 1968).

the cause of the union's 1964 strike.[20] In its appeal of the NLRB's decision to the Ninth Circuit, MacMillan objected to the NLRB's findings on the basis of the statute of limitations in section 10(b).[21] The Ninth Circuit reversed the NLRB's decision,[22] holding that the evidence of a violation within the six-month limitations period was too insubstantial to support the charge that an unfair labor practice had occurred within the six-month period.[23] The court found that the NLRB had *relied primarily* upon events occurring prior to the limitations period to show the unfair labor practice within the six-month period.[24] Due to an agreement between the parties that bargaining be postponed during a period of industry-wide negotiations, the company and the union had met only once to negotiate a new collective bargaining agreement during the six-month limitations period.[25] The court of appeals held that there was insufficient evidence from the fact that there was only one meeting between the parties, within the six-month limitations period, to establish that the company had refused to bargain in good faith with the union.[26]

Hence, the Ninth Circuit in *MacMillan* held that *primary reliance* upon evidence of events prior to the six-month limitations period would not be allowed to establish an unfair labor practice within that period if only *insubstantial* evidence of the unfair labor practice within the six-month period was found.

The *MacMillan* decision not only applied the dictum of *Local 1424, IAM* to a litigated dispute,[27] it also clarified for the NLRB the quantum of evidence that must be found within the limitations period before evidence originating prior to the six-month period would be admissible to support the inference that the violator's previous conduct or motive has continued. When the second situation raised and answered by the Supreme Court in *Local 1424, IAM*, holding that the continuing tort doctrine will not be applied when *no* evidence of an unfair labor practice violation continuation is found within the limitations period, is combined with the third situation mentioned in *Local 1424, IAM*, but answered in *MacMillan*, holding that the continuing tort doctrine will not be applied when *insubstantial* evidence of such continuation is found within the limitations period, the result is a complete rejection of the continuing tort doctrine in unfair labor practice cases *where there is less than substantial evidence that the*

[20] *Id.* at 28.
[21] *Id.*
[22] *Id.* at 33.
[23] *Id.*
[24] *Id.*
[25] *See id.* at 28.
[26] *Id.* at 29.
[27] *See id.* at 32.

violation occurred during the six-month period. In other words, the prior conduct or motive of the party charged can only be said to have continued when substantial evidence of the violation is found within the limitations period.[28] The *MacMillan* decision completes the federal law concerning the weight to be given evidence of previous unfair labor practices which occur prior to the limitations period.

In arriving at its decision in *MacMillan*, the Ninth Circuit relied upon what it called the *News Printing-Universal Oil-Tennessee Knitting Mills* doctrine.[29] In *News Printing Company*,[30] the NLRB found that the trial examiner had relied primarily upon a previous NLRB decision against the company for wage discrimination against certain employees because of their union activities and found little evidence, standing alone, to substantiate an unfair labor practice in the instant case within the six-month limitations period. The Board held that independent and controlling weight could not be given to such prior evidence.[31] In *Universal Oil Products Company*,[32] and *In re Tennessee Knitting Mills*,[33] the Board found that the companies had, in each case, dominated and supported an employees' association more than six months prior to the filing of the charge. The Board held that the inference of an unfair labor practice could not be said to have continued into the limitations period since only insubstantial evidence of the practice was found within the six-month period.[34] These three NLRB decisions have been followed for the most part by the NLRB.[35] Thus, these Board decisions and the *Local 1424, IAM* opinion indicate that the Ninth Circuit's rejection of the continuing

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[28] *See id.* at 33; *see also* NLRB v. Bakers Local 50, 245 F.2d 542, 547 (2d Cir. 1957); Merrill Transp. Co., 141 N.L.R.B. 1089, 1097 (1963); Longshoremen's Local 1418, 102 N.L.R.B. 720, 730 (1953).

[29] NLRB v MacMillan Ring-Free Oil Co., 394 F.2d 26, 32 (9th Cir. 1968). The same three cases were mentioned by the Supreme Court in *Local 1424, IAM* when it raised the question whether, under section 10(b), evidence of unfair labor practices occurring prior to the limitations period could be admitted where only insubstantial evidence of unfair labor practices is found within the limitations period. *See* Local 1424, IAM v. NLRB, 362 U.S. 411, 421 (1960).

[30] 116 N.L.R.B. 210 (1956).

[31] *Id* at 212.

[32] 108 N.L.R.B. 68 (1954).

[33] 88 N.L.R.B. 1103 (1950).

[34] Universal Oil Prods. Co., 108 N.L.R.B. 68, 69-70 (1954); In re Tennessee Knitting Mills, 88 N.L.R.B. 1103, 1105 (1950).

[35] *See, e.g.*, Gold Merit Packing Co., 142 N.L.R.B. 205, 206, 208 (1963); Merrill Transp. Co., 141 N.L.R.B. 1089, 1097 (1963); Retail Clerks Local 344, 136 N.L.R.B. 1270, 1284 (1962); Inland Seas Boat Co., 131 N.L.R.B. 706, 709 (1961); Breckinridge Gasoline Co., 127 N.L.R.B. 1462, 1465 (1960).

tort doctrine in unfair labor practices is not a new theory.[36] But the Ninth Circuit is the first circuit court, and the highest court to date, to have squarely held the doctrine completely inapplicable to the factual situation in *MacMillan.*

Although elimination of the possibility of using insubstantial evidence during the six-month period will make it more difficult for the NLRB to establish an unfair labor practice against a previous violator, it does not seem unfair in light of the purpose of section 10(b)[37] to make the Board prove by substantial evidence that the earlier motive or conduct continued into the limitations period. NLRB decisions have been consistent in holding that acts and conduct of the party charged with violating the National Labor Relations Act must be found within the six-month period, or be found to have extended into that period, in order to support the inference that the prior motive has continued into the limitations period.[38]

Moreover, the history and purpose of section 10(b) as articulated by Congress[39] supports the Ninth Circuit's decision. The provision in section 10(b) creating the six-month statute of limitations did not appear in section 10(b) of the original National Labor Relations Act,[40] but was added by amendment in 1947.[41] The purpose for enacting section 10(b)'s statute of limitations was stated by Congress in 1957:

> It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim, and confused. Allowing 6 months for filing a charge . . . does not seem unreasonable.[42]

As the Ninth Circuit stated in *MacMillan,* the stabilization of bargaining relationships is "hardly enhanced by the possibility that one

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[36] As early as 1952 two federal courts rejected the continuing tort doctrine as contrary to the spirit of section 10(b). NLRB v. Pennwoven, Inc., 194 F.2d 521, 526 (3d Cir. 1952); Stewart-Warner Corp. v. NLRB, 194 F.2d 207, 209 (4th Cir. 1952). However, there was no discussion in these cases of how much weight should be given evidence of unfair labor practices occurring prior to the limitations period in a later NLRB proceeding.

While the continuing tort doctrine has been recognized in other areas of the law, it appears to be inapplicable in unfair labor practice cases. Local 1424, IAM v. NLRB, 362 U.S. 411, 423-24 n.15 (1960).

[37] See text accompanying notes 43-44 *infra.*

[38] *See, e.g.,* Wahlgren Magnetics, 132 N.L.R.B. 1613, 1618 n.4 (1961); Peterson Constr. Corp., 128 N.L.R.B. 969, 993 n.5 (1960); Yutana Barge Lines, Inc., 123 N.L.R.B. 1073, 1081 n.3 (1959); H.R. McBride Constr. Co., 122 N.L.R.B. 1634, 1637 n.4 (1959); Engineers Local 12, 119 N.L.R.B. 307, 323 n.7 (1957).

[39] See text accompanying notes 42-46 *infra.*

[40] NLRA, 49 Stat. 453-54 (1935).

[41] Labor-Management Relations Act, 61 Stat. 146 (1947).

[42] H.R. REP. No. 245, 80th Cong., 1st Sess. 40 (1947), *partially quoted in* NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 32 (9th Cir. 1968).

party may dredge up events . . . in the guise of 'evidence' designed to 'shed light' on the more recent conduct, and base unfair labor practice charges primarily upon such bygone events."[43] This very short statute of limitations indicates that Congress felt that industrial peace could best be accomplished by not permitting the initiation of litigation for conduct which had ceased more than six months previously.[44] While the section 10(b) limitations period has been criticized,[45] it is probable that "[w]hatever the term of the statute of limitations there will be objections made to it."[46]

The rejection of the possibility of using insubstantial evidence of acts occurring during the six-month period as the means by which evidence of acts occurring prior to that period may be admissible to establish an unfair labor practice is also justified and, moreover, significant because it equalizes the previous violator's standing with that of the other party for future negotiations. Under the continuing tort doctrine, the party against whom the unfair labor practice was found to have been committed would be on unequal footing with the other bargaining parties in all future collective bargaining since one party, once having committed a violation, would be subject in the future to an unfair labor practice charge whenever he committed any new injurious act against the other party, no matter how insubstantial.

In conclusion, the *MacMillan* decision holds that the conduct or motive of a previous violator of the National Labor Relations Act can be said to have continued into the six-month limitations period *if and only if* the Board can find substantial evidence of an unfair labor practice within the limitations period. If only insubstantial evidence of an unfair labor practice is found within the statutory period, the prior conduct and motivation of the person charged with such violation can be used only as background evidence, and cannot be *primarily relied upon* to establish an unfair labor practice within the six-month period. Suspicion, remote inferences, and guesswork will no longer be allowed as a substitute for substantial proof in order to find a violation of the National Labor Relations Act within the limitations period.[47] "Put another way, with only a slight grasp

[43] NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 32 (9th Cir. 1968).

[44] Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 657-58 (1961).

[45] *See* Shaw, *Labor Law For The Average Lawyer's Labor Practice*, 28 ORE. L. REV. 138, 145 (1949); S. REP. No. 105, 80th Cong., 1st Sess., pt. 2, at 5 (1947) (minority report), where section 10(b) was attacked by its opponents as "the shortest statute of limitations known to the law thereby offering a premium to those employers who conceal commission of unfair labor practices."

[46] 93 CONG. REC. 4283 (1947) (remarks of Senator Smith, a sponsor of the 1947 Amendments).

[47] Riggs Distler & Co. v. NLRB, 327 F.2d 575, 580 (4th Cir. 1963).

on the 10(b) tip of a dragon's tail, General Counsel[48] is not permitted to pull in the dragon."[49]

B. S. W.

[48] NLRA § 3(d), 29 U.S.C. § 153(d) (1964). The General Counsel of the NLRB, appointed by the President of the United States, supervises all attorneys employed by the NLRB, and has final authority on behalf of the NLRB to prosecute complaints before the Board.

[49] United States Gypsum Co., 143 N.L.R.B. 1122, 1132 n.3 (1963).